

1                   BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2                   STATE OF WASHINGTON

3 MORGAN J. & BARBARA K. DAVIS, )

4                   Appellants, )

5                   v. )

6 STATE OF WASHINGTON, DEPARTMENT )  
OF ECOLOGY, )

7                   Respondent. )

PCHB NO. 88-94

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

9           This matter, the appeal of a Notice of State Regulation issued  
10 under the water code, relating to waters stored in Bonaparte Lake,  
11 came on for hearing on February 27, 1989 in Seattle, Washington,  
12 before the Pollution Control Hearings Board; Wick Dufford (presiding)  
13 and Judith A. Bendor.

14           Appellants Davis represented themselves. Respondent Department  
15 of Ecology (DOE) was represented by V. Lee Okarma Rees, Assistant  
16 Attorney General. The case was reported by Robert H. Lewis &  
17 Associates, Court Reporters.  
18

1 Witnesses were sworn and testified. Exhibits were examined.  
2 From the testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Bonaparte Creek drains an area of about 148 square miles to the  
6 east of Tonasket, Washington. Bonaparte Lake is located in the upper  
7 reaches of the drainage basin. An earth-fill dam with a sliding gate  
8 for control works is at the southwest end of the lake. Bonaparte  
9 Creek exits the lake and flows south and west for approximately 30  
10 miles until it joins the Okanogan River at Tonasket. Along this route  
11 are numerous farms which divert water from the creek for crops and  
12 livestock.

13 II

14 The irrigation season in the Bonaparte Creek drainage is  
15 generally between May 1 and October 31. The dam on Bonaparte Lake  
16 permits the use of the lake for storage of some irrigation water.  
17 When this stored water is released, the creek bed serves as the  
18 conduit for its delivery to the lands downstream where it is used for  
19 irrigation.

20 The winters in the drainage are cold and snow covers the ground  
21 for an extended period. The spring freshet normally begins before the  
22 irrigation season and during the early portion of that season there is  
23 normally more than enough water in the creek to satisfy diversionary  
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1 rights. However, as the season progresses, the adequacy of the  
2 surface water supply to meet all demands often becomes a problem.

### 3 III

4 In the late 1960's and 1970's a general adjudication of the  
5 waters of the Bonaparte Creek/Bonaparte Lake drainage basin was  
6 conducted. The court's decree entered in 1979 confirmed rights to  
7 divert the natural flow of the creek and also confirmed rights to use  
8 waters stored in Bonaparte Lake. (Okanogan County Cause No. 17787).

9 The present case involves an attempt to regulate the conduct of  
10 the stored water users.

### 11 IV

12 Because the bed of Bonaparte Creek both carries natural stream  
13 flows and serves as the conduit for delivery of stored waters, there  
14 is a practical difficulty in determining which is which at points of  
15 diversion along the creek.

16 This problem is compounded by the geohydrology of the basin and  
17 the seasonal variation of natural flows. As it proceeds, the creek  
18 has alternating gaining and losing reaches.

19 Near roughly the middle of Bonaparte Creek's length, the  
20 tributary Peony Creek flows in, adding the outflow from the Aeneas  
21 Valley to the south.

### 22 V

23 Rights to use an annual total of 1,080 acre feet of water stored  
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in Bonaparte Lake were confirmed in the general adjudication, all with a 1918 priority.

Along with the confirmation of users' rights, the court established a minimum lake level for Bonaparte Lake.

The judicial decree left undisturbed the following conclusion of the referee:

The Director [of DOE] should, at his discretion, require that any person taking either surface or ground waters from the Bonaparte Creek and Bonaparte Lake drainage basin, provide and maintain at his expense, proper diversion works and/or measuring devices as may be required under RCW 90.03.360. Approval of design, installation, maintenance, and operation of such works and measuring devices will be as prescribed by the Director.

## VI

As of the 1987 and 1988 irrigation seasons, five irrigators were attempting to use water from storage rights. Two of these were above the inflow from Peony Creek and the other three were below that point. Appellants Davis are among the three downstream diverters.

## VII

On October 27, 1987, the DOE issued an Order to the storage right holders, including Morgan Davis. The Order (No. DE 87-C423) outlined the confirmation of storage rights in the adjudication and then, set forth the following finding:

Investigation by representatives of this office have disclosed that the Bonaparte Lake outlet control works are in disrepair and are inadequate and also that a

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1 measuring device is lacking. This condition makes it  
2 impossible for the district watermaster and/or the  
3 assigned stream patrolman to practically administer  
4 diversion of storage waters of Bonaparte Lake  
equitably and in conformity with Okanogan County  
Superior Court decree No. 17787.

5 The Order went on to require its recipients "prior to storing water  
6 for the 1988 and subsequent irrigation seasons" to cooperate in  
7 installing controlling works and a measuring device acceptable to DOE  
8 at the outlet of the lake. The Order called for notification of DOE  
9 when the job was complete and for submitting a description of the  
10 works and measuring device installed. The Order warned:

11 Failure to comply with this notice will result in  
12 initiation of action leading to the state regulation of  
the right to store and withdraw water from Bonaparte  
13 Lake.

14 Order No. DE 87-C423 was not appealed.

15 VIII

16 After receipt of the October 1987 Order, repairs were made to the  
17 controlling works to correct damage from vandalism the year before.  
18 However, no measuring device was installed and no drawings were sent  
19 to DOE.

20 On May 13, 1988, DOE mailed a letter to the storage right holders  
21 reminding them of the terms of Order No. DE 87-C423 and advising that  
22 no report had been received on the work ordered. The letter  
23 reiterated the warning about the possibility of state regulation and  
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1 asked for a status report "in that the 1988 irrigation season is upon  
2 us."

3 Though they farm property on Bonaparte Creek, the Davises reside  
4 across the mountains in Bellingham, Washington. DOE's letter to  
5 Morgan Davis was mailed to their property in Tonasket, not to their  
6 home in Bellingham, and the Davises did not receive it.

7 IX

8 On June 2, 1988, the DOE posted the controlling works at  
9 Bonaparte Lake with a Notice of State Regulation and sent copies to  
10 the storage right holders. The Notice cited as its basis a failure to  
11 comply with Order No. DE 87-C423. The Notice ordered its recipients  
12 to refrain from diverting water from Bonaparte Creek pursuant to the  
13 adjudication decree until such time as the activities required by  
14 Order No. DE 87-C4123 had been completed.

15 The Davises received the Notice of State Regulation on June 16,  
16 1988.

17 X

18 On July 7, 1988, the Pollution Control Hearings Board received  
19 the Davis' appeal from the Notice of State Regulation.

20 The appeal asserted that the timing of the Notice (after the  
21 commencement of the irrigation season) was unfair and questioned the  
22 appropriateness of the site for the measuring device (at the lake  
23 outlet) selected by DOE. The appeal also raised an issue over the  
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1 intent in so doing was to litigate the question of the timing of the  
2 Notice of State Regulation. Further they sought to obtain  
3 clarification of the proper topographical location for the works  
4 required by DOE.

5 After continuances to allow for further negotiations, the matter  
6 eventually came to hearing before the Board on February 27, 1989.

#### 7 XIII

8 The terrain below the Bonaparte Lake dam is boggy meadow land  
9 which presents relatively flat topography for two miles or so  
10 downstream of the lake outlet. In the past, beaver dams in the area  
11 immediately below the lake outlet have blocked releases from the lake.

12 The topography has given rise to a debate over where the flow  
3 measurement point ought to be and what sort of structure would provide  
14 the most accurate information.

#### 15 XIV

16 During the 1988 growing season, the Davises were attempting to  
17 raise alfalfa and garlic on their Bonaparte Creek property. They had  
18 not started irrigating before receiving the Notice of State Regulation  
19 and remained shut down until it was superseded.

#### 20 XV

21 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
22 adopted as such.

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1 From these Findings of Fact the Board reaches the following:

2 CONCLUSIONS OF LAW

3 I

4 The Board has jurisdiction over the parties and the subject  
5 matter. Chapters 90.03 and 43.21B RCW.

6 The issuance of a superseding order at the end of July of 1988  
7 did not render moot the propriety of the Notice of State Regulation,  
8 dated June 2, 1988.

9 II

10 RCW 90.03.360 states:

11 The owner or owners of any ditch or canal shall  
12 maintain, to the satisfaction of the department,  
13 substantial controlling works, and a measuring  
14 device at the point where water is diverted and  
15 these shall be so constructed as to permit of  
16 accurate measurement and practical regulation of  
17 the flow of water diverted into said ditch or  
18 canal. Every owner or manager of a reservoir for  
19 the storage of water shall construct and maintain,  
20 when required by the department, any measuring  
21 device necessary to ascertain the natural flow  
22 into and out of said reservoir.

18 III

19 The statutory provisions for construction work in connection with  
20 appropriating water explicitly require DOE to establish construction  
21 schedules which are reasonable. RCW 90.03.320. Appellants argue that  
22 reasonableness is likewise an implicit limit of DOE's power to order  
23 installation of controlling works and measuring devices under RCW  
24 90.03.360.

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1 We agree. It is axiomatic that governmental power cannot be  
2 arbitrarily exercised, that governmental discretion cannot be used  
3 abusively. This hearings board is intended to provide procedural  
4 safeguards against such possible behavior. See, Barry & Barry, Inc.  
5 v. Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972),  
6 Yakima Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255,  
7 534 P.2d 33 (1975).

#### 8 IV

9 However, the procedural safeguards provided by law must  
10 themselves be properly invoked. This Board can perform its function  
11 only within the bounds defining its own jurisdiction. We can review  
12 only those orders of DOE which are timely appealed to us. RCW  
13 43.21B.310.

14 Because Order No. DE 87-C423, issued on October 27, 1987 was not  
15 appealed, we are without authority to rule on its reasonableness.  
16 See, Bock v. Board of Pilotage Commissioners, 91 Wn.2d 94, 580 P.2d  
17 1173 (1978). Accordingly, the questions raised about the siting of  
18 the measuring device and about requiring the expense to be born solely  
19 by storage right holders are not properly before us.

#### 20 V

21 This brings us to the matter of the propriety of the Notice of  
22 State Regulation. The Notice was, in effect, a cease and desist  
23 order, a type of order within DOE's authority to impose.  
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1 RCW 43.27A.190 empowers DOE to issue cease and desist orders  
2 whenever any directive or order issued by the department under chapter  
3 90.03 RCW is violated or about to be violated. Here there was an  
4 outstanding regulatory order to install controlling works and a  
5 measuring device "prior to storing water for the 1988 and subsequent  
6 irrigation seasons." The ordered work had not been timely performed.

7 Moreover, since appellants are entitled to use only stored water,  
8 any diversion from the lake by them in 1988, if not a violation of the  
9 outstanding regulatory order, would of necessity have involved the  
10 diversion of natural flows -- a violation of the limits of their water  
11 right. The DOE has the power to prevent the use of water to which a  
12 right holder is not entitled. RCW 90.03.070.

13 VI

14 Appellant contends that the Notice of State Regulation was  
15 unreasonable because of the timing of its issuance in June of 1988  
16 after the growing season was in progress and decisions about crops for  
17 that year had already long since been made.

18 In the instant context, we are not convinced by this argument.  
19 Appellants had the power to avoid the posting of their diversion works  
20 by complying with the October 1987 Order prior to the irrigation  
21 season. They neither appealed that Order, nor made any attempt to  
22 seek an extension of time for compliance from DOE. They made their  
23 cropping decisions for 1988 with the full knowledge that the 1987  
24

1 Order had not been fulfilled. No measuring device was in place.

2 Moreover, the 1987 Order expressly warned that non-compliance  
3 would result in "state regulation of the right to store and withdraw  
4 water from Bonaparte Lake." Under all the circumstances, we cannot  
5 conclude that the timing of the Notice of State Regulation was  
6 unreasonable.

## 7 VII

8 We note that, so far as the record shows, the October 1987 Order  
9 is still in effect. That Order is terse, providing no detailed steps  
10 as to how to achieve compliance. It merely requires "proper  
11 controlling works and measuring device acceptable to the Department of  
12 Ecology." Prudence would seem to dictate that plans be submitted and  
13 approved before construction begins. But, DOE could assist the  
14 process of achieving what it has ordered by providing a compliance  
15 schedule, setting forth specific dates for the accomplishment of  
16 identified steps.

17 The installation being required of the storage rights holders is,  
18 of course, not the whole solution to the difficult problem of dividing  
19 and regulating the use of surface water in this complex drainage  
20 system. A successful cooperative approach between the DOE and the  
21 water users on this matter, may serve as the model for additional  
22 measures taken in the future to ensure the proper allocation of the  
23 resource to all users.

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VIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Pollution Control Hearings Board enters the following:

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ORDER

The Notice of State Regulation issued to Morgan Davis is affirmed.  
DONE this 8<sup>th</sup> day of December, 1989.

POLLUTION CONTROL HEARINGS BOARD

(Wick Dufford)  
WICK DUFFORD, Presiding

Judith A. Bendor  
JUDITH A. BENDOR, Chair